

1. The Hillsboro-Deering Cooperative School District (School District), the respondent, is a public employer within the meaning of RSA 273-A:1 X.
2. Bruce Buttrick, the complainant, was employed by the School District as a custodian between July 1, 1992 and February 19, 1993. He and the Hillsboro-Deering Cooperative School District were parties to two different employment agreements during that period. His employment status during the time of the second agreement is at issue.
3. The first written agreement between the parties was for the performance of part-time custodial work for which Mr. Buttrick was to be paid six dollars and fifty cents and hour (\$6.50) for the period, July 1, 1992 through June 30, 1993. This agreement was supplanted by the second agreement for the position of night custodial supervisor at the elementary/middle school, a full-time position which began on October 19, 1992 and was to continue for fifty two weeks. Mr. Buttrick was to be paid "\$8.25 beginning 10-19-92; at end of three (3) months, \$8.50/HR."
4. The above cited wage term of the agreement made no specific reference to a probation period during the initial three months of the agreement. The complainant testified that he was not told of a probation period at the contract's initiation. Respondent's witnesses testified that Buttrick was told that he was on three months probation and that it was the practice of the School District to routinely establish probation after a promotion.
5. On January 22, 1993, more than three months after Mr. Buttrick commenced his new position, he was informed by his supervisor that his three month probation was being extended. On February 19, 1993, he was given a letter of termination.
6. At all times relevant, Mr. Buttrick officially reported to Willard Johnson, superintendent of buildings and grounds. However, beginning approximately one month from his promotion, in mid-November until January 14, 1993, Mr. Johnson was on sick leave recovering from heart surgery. During this time, Buttrick was supervised by Wayne Emerson, building administrator, who held weekly meetings with staff including Dan Luce, Don Mitchell, custodians and Patrick Hines, night custodial supervisor at the high school.

7. Mr. Buttrick made contact with union representatives. On November 4, 1992, Harriett Spencer, AFSCME organizer, conducted an organizational meeting. Mr. Buttrick introduced Ms. Spencer and assisted with distributing and then collecting signature cards from the attendees.
8. A petition for the formation of a bargaining unit to be made up of all custodians and groundskeepers was filed with to the PELRB on December 2, 1992. A unit determination hearing was scheduled for February 11, 1993 and then continued. A bargaining unit was certified on August 26, 1993.
9. Mr. Buttrick sent a memorandum to the nine other potential bargaining unit members following the 1992 Christmas/New Year holiday. He reported on the progress of the unionization effort and mentioned that the School District was trying to exclude the night custodial supervisors, his position, from the bargaining unit. Recipients of the memo were listed thereon and included Don Mitchell who favored the union and Dan Luce and Patrick Hines who did not then favor the establishment of a bargaining unit. Dan Luce said he was annoyed to be mentioned on the union document and that he had discussed his annoyance with Mr. Emerson.
10. Mr. Luce testified that he spoke to Mr. Johnson regarding unionization upon his return from sick leave in mid-January. His recollection was that Mr. Johnson felt positively about the union and urged his support. Mr. Hines testified that he recalled that both Mr. Johnson and Mr. Emerson favored the establishment of a bargaining unit as it would be helpful to them.
11. In contrasting testimony, Mr. Buttrick recalled that he was summoned to Mr. Johnson's office on January 22th and was handed a document and was asked by Johnson, "What's all this shit about a union forming?" He attested that the document informed him for the first time of the ninety day probation period and its extension.
12. Mr. Johnson testified that he was unaware of the identity of the "ringleader" until after Mr. Buttrick's termination. However, he also offered that he likely told Dan Luce and Don Mitchell spontaneously on the day of termination that Bruce Buttrick, "is gone and his termination has nothing to do with the union." Mr. Johnson also attested that, prior to that time, he had offered no opinion for or against the

organization of a bargaining unit. After the termination, he told his employees that, with the coming of a bargaining unit, he could no longer fight for them if they were members.

13. The day before Willard Johnson informed Mr. Buttrick of the probation extension by letter, Wayne Emerson and Buttrick had had a heated verbal exchange during a staff meeting when the complainant raised the subject of his superiors' lack of enforcement of building use rules, an ongoing source of contention between the two.
14. Wayne Emerson's duties as business administrator included union negotiations. He testified that he would find it difficult to deal with Bruce Buttrick in negotiations. He stated that he discussed the complainant's union activities with Dan Luce who came to him with complaints after having received the post-holiday memorandum about the progress of unionization sent by Buttrick. Mr. Johnson attested that he knew he couldn't say anything about the union to Emerson if he were going to fire Bruce Buttrick and that he had decided, on January 14, to fire Bruce Buttrick, so little was said between Emerson and Johnson about the union but much was said about complaints of poor performance against Buttrick.
15. Respondents' witnesses testified that there were complaints about unclean conditions at the Hillsboro-Deering Elementary/Middle School and that Mr. Buttrick's failure to perform well supervising the cleaning of the school led to his termination. Kathleen Pepper, a first grade teacher, complained about nauseating orders coming from the boys' bathroom and carpets not being cleaned. Wayne Emerson observed the build up of wax under doors and took complaints from the nurse and others about cleanliness.
16. Don Mitchell is a custodian who worked under the complainant. It is his belief that Buttrick was fired for his union activities. He said Bruce Buttrick was a hard worker and the best supervisor he had ever had. Mr. Johnson agreed that the complainant was a good worker but believes him to be a poor supervisor
17. Evidence contradicting School District testimony regarding the conditions of the buildings included a letter from the principal of the elementary/middle school, Barry Ring. A letter from A. Jane Hamilton, a gym teacher, lauded the good conditions found when she returned from vacation.

Mr. Buttrick testified that he performed the jobs assigned including the stripping of the cafeteria floor, despite a shortage of help and some broken equipment.

18. Mr. Johnson stated that the project of stripping the cafeteria floor was too large to be undertaken over the Christmas break and that Mr. Buttrick was at fault for attempting it. On cross examination, Johnson said that, in fact, he may have assigned the stripping of the floor.
19. After his termination, some 4 months after he was first employed as a night custodial supervisor, Mr. Buttrick followed the grievance procedure in effect on the advice of Harriett Spencer. He was not allowed to present his facts at a hearing. His employer reasoned that he was a probationary employee not entitled to access to the grievance procedure.
20. The bargaining unit for custodians and groundskeepers was established by agreement of the parties following a compromise which eliminated the night custodial supervisors, Buttrick's position, and substituted two custodial positions which would remain vacant. This yielded a ten member bargaining unit. The minimum number of members in a bargaining unit as mandated by RSA 273-A:8 was thereby met.

DECISION AND ORDER

RSA 273-A:1 IX (d) excludes probationary employees from the definition of "public employee." The initial question as to whether or not the claimant is a "public employee" within the meaning of RSA 273-A:1 IX is answered in the affirmative. There is an absence of the mention of a probation period in the language of the individual contract under which the complainant was employed. Even if the complainant had been working under a three month probation, that probation would have begun on the day he commenced working as night custodial supervisor, October 19, 1992, and ended by January 19, 1994, after which the claimant would have been a permanent employee entitled to the protection of Chapter 273-A. In either case, he was a permanent employee with recourse to RSA 273-A:5 for the purposes of this decision.

To prevail on a charge of retaliatory termination under of RSA 273-A:5 I (c), the charging party must demonstrate the presence anti-union animus leading to retaliation against the charging employee, usually a union organizer. In the present case, the complainant's attorney has argued that, but for the complainant's union organizing activities, he would still be employed with the School District. Reviewing the facts of the case, so clear a

conclusion can not be reached. However, that possibility does not defeat his claim.

Union organizing or union activity need be only one of the reasons for termination for it to be considered a basis for a retaliatory firing, an unfair labor practice, RSA 273-A:5 I (c). The presence of some minimal degree of anti-union animus must be shown in order to prevail. It is present in this case. Appeal of White Mountain Education Association, 125 NH 771 (1984).

The most convincing evidence in determining that a degree of anti-union sentiment was present and that union activity was a factor in the termination of Mr. Buttrick was the very statement by Mr. Johnson spontaneously spoken to Buttrick's co-workers that union activities had nothing to do with Mr. Buttrick's termination. It does not serve as an affirmative defense. Appeal of Professional Firefighters of East Derry, 138 N.H. 142 at 145 (1993) Obviously, Buttrick's union involvement was an active question being discussed among his supervisors and fellow employees so that it was the only explanation needed following the statement that Bruce Buttrick was gone. Also, inconsistent testimony by respondent's witnesses regarding motivation and events weighs heavily in deciding that anti-union sentiment was among the factors which led to Mr. Buttrick's termination. Finally, the chronology of events leading to the establishment of the bargaining unit, taken in relation to Mr. Buttrick's probation and termination, can not be overlooked. The Hillsboro-Deering School District was ready to accept a bargaining unit that would be manageable after the instigator or "ringleader" of the organization effort had been eliminated.

The complainant is entitled to relief. The Hillsboro-Deering School District is required to reinstate Mr. Buttrick to his previous position of night custodial supervisor and to provide him with back pay from the date of his termination. Upon reinstatement, Mr. Buttrick is entitled to all processes and protections afforded permanent employees under the collective bargaining agreement.

So ordered.

Signed this 27th day of DECEMBER, 1994.


 EDWARD J. HASELTINE
 Chairman

By unanimous vote. Chairman Edward J. Haseltine presiding.
 Members Richard Roulx and E. Vincent Hall present and voting.